Judgment of the Court of 27 September 1988.

The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail

Case 81/87.

1 . The Treaty regards the differences in national legislation concerning the connecting factor required of companies incorporated thereunder and the question whether - and if so how - the registered office or real head office of a company incorporated under national law may be transferred from one Member State to another as problems which are not resolved by the rules concerning the right of establishment but must be dealt with by future legislation or conventions, which have not yet been adopted or concluded . Therefore, in the present state of Community law, Articles 52 and 58 of the Treaty, properly construed, confer no right on a company incorporated under the legislation of a Member State and having its registered office there to transfer its central management and control to another Member State .

2 . The title and provisions of Council Directive 73/148 of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services refer solely to the movement and residence of natural persons, and the provisions of the directive cannot, by their nature, be applied by analogy to legal persons . Therefore, Directive 73/148, properly construed, confers no right on a company to transfer its central management and control to another Member State .

Grounds

1 By an order of 6 February 1987, which was received at the Court on 19 March 1987, the High Court of Justice, Queen' s Bench Division, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty four questions on the interpretation of Articles 52 and 58 of the Treaty and Council Directive 73/148 of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (Official Journal 1973, L 172, p . 14).

2 Those questions arose in proceedings between Daily Mail and General Trust PLC, the applicant in the main proceedings (hereinafter refered to as "the applicant "), and HM Treasury for a declaration, inter alia, that the applicant is not required to obtain consent under United Kingdom tax legislation in order to cease to be resident in the United Kingdom for the purpose of establishing its residence in the Netherlands .

3 It is apparent from the documents before the Court that under United Kingdom company legislation a company such as the defendant, incorporated under that legislation and having its registered office in the United Kingdom, may establish its central management and control outside the United Kingdom without losing legal personality or ceasing to be a company incorporated in the United Kingdom .

4 According to the relevant United Kingdom tax legislation, only companies which are resident for tax purposes in the United Kingdom are as a rule liable to United Kingdom corporation tax . A company is resident for tax purposes in the place in which its central management and control is located .

5 Section 482 (1) (a) of the Income and Corporation Taxes Act 1970 prohibits companies resident for tax purposes in the United Kingdom from ceasing to be so resident without the consent of the Treasury .

6 In 1984 the applicant, which is an investment holding company, applied for consent under the abovementioned national provision in order to transfer its central management and control to the Netherlands, whose legislation does not prevent foreign companies from establishing their central management there; the company proposed, in particular, to hold board meetings and to rent offices for its management in the Netherlands. Without waiting for that consent, it subsequently decided to open an investment management office in the Netherlands with a view to providing services to third parties.

7 It is common ground that the principal reason for the proposed transfer of central management and control was to enable the applicant, after establishing its residence for tax purposes in the Netherlands, to sell a significant part of its non-permanent assets and to use the proceeds of that sale to buy its own shares, without having to pay the tax to which such transactions would make it liable under United Kingdom tax law, in regard in particular to the substantial capital gains on the assets which the applicant proposed to sell . After establishing its central management and control in the Netherlands the applicant would be subject to Netherlands corporation tax, but the transactions envisaged would be taxed only on the basis of any capital gains which accrued after the transfer of its residence for tax purposes .

8 After a long period of negotiations with the Treasury, which proposed that it should sell at least part of the assets before transferring its residence for tax purposes out of the United Kingdom, the applicant initiated proceedings before the High Court of Justice, Queen' s Bench Division, in 1986 . Before that court, it claimed

that Articles 52 and 58 of the EEC Treaty gave it the right to transfer its central management and control to another Member State without prior consent or the right to obtain such consent unconditionally .

9 In order to resolve that dispute, the national court stayed the proceedings and referred the following questions to the Court of Justice :

(1) Do Articles 52 and 58 of the EEC Treaty preclude a Member State from prohibiting a body corporate with its central management and control in that Member State from transferring without prior consent or approval that central management and control to another Member State in one or both of the following circumstances, namely where :

(a) payment of tax upon profits or gains which have already arisen may be avoided;

(b) were the company to transfer its central management and control, tax that might have become chargeable had the company retained its central management and control in that Member State would be avoided?

(2) Does Council Directive 73/148/EEC give a right to a corporate body with its central management and control in a Member State to transfer without prior consent or approval its central management and control to another Member State in the conditions set out in Question 1? If so, are the relevant provisions directly applicable in this case?

(3) If such prior consent or approval may be required, is a Member State entitled to refuse consent on the grounds set out in Question 1?

(4) What difference does it make, if any, that under the relevant law of the Member State no consent is required in the case of a change of residence to another Member State of an individual or firm?

10 Reference is made to the Report for the Hearing for a fuller account of the facts and the background to the main proceedings, the provisions of national legislation at issue and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court .

First question

11 The first question seeks in essence to determine whether Articles 52 and 58 of the Treaty give a company incorporated under the legislation of a Member State and having its registered office there the right to transfer its central management and control to another Member State . If that is so, the national court goes on to ask whether the Member State of origin can make that right subject to the consent of national authorities, the grant of which is linked to the company' s tax position .

12 With regard to the first part of the question, the applicant claims essentially that Article 58 of the Treaty expressly confers on the companies to which it applies the same right of primary establishment in another Member State as is conferred on natural persons by Article 52 . The transfer of the central management and control of a company to another Member State amounts to the establishment of the company in that Member State because the company is locating its centre of decision-making there, which constitutes genuine and effective economic activity .

13 The United Kingdom argues essentially that the provisions of the Treaty do not give companies a general right to move their central management and control from one Member State to another . The fact that the central management and control of a company is located in a Member State does not itself necessarily imply any genuine and effective economic activity on the territory of that Member State and cannot therefore be regarded as establishment within the meaning of Article 52 of the Treaty .

14 The Commission emphasizes first of all that in the present state of Community law, the conditions under which a company may transfer its central management and control from one Member State to another are still governed by the national law of the State in which it is incorporated and of the State to which it wishes to move . In that regard, the Commission refers to the differences between the national systems of company law . Some of them permit the transfer of the central management and control of a company and, among those, certain attach no legal consequences to such a transfer, even in regard to taxation . Under other systems, the transfer of the management or the centre of decision-making of a company out of the Member State in which it is incorporated results in the loss of legal personality . However, all the systems permit the winding-up of a company in one Member State and its reincorporation in another . The Commission considers that where the transfer of central management and control is possible under national legislation, the right to transfer it to another Member State is a right protected by Article 52 of the Treaty .

15 Faced with those diverging opinions, the Court must first point out, as it has done on numerous occasions, that freedom of establishment constitutes one of the fundamental principles of the Community and that the provisions of the Treaty guaranteeing that freedom have been directly applicable since the end of the transitional

period . Those provisions secure the right of establishment in another Member State not merely for Community nationals but also for the companies referred to in Article 58 .

16 Even though those provisions are directed mainly to ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation which comes within the definition contained in Article 58 . As the Commission rightly observed, the rights guaranteed by Articles 52 et seq . would be rendered meaningless if the Member State of origin could prohibit undertakings from leaving in order to establish themselves in another Member State . In regard to natural persons, the right to leave their territory for that purpose is expressly provided for in Directive 73/148, which is the subject of the second question referred to the Court .

17 In the case of a company, the right of establishment is generally exercised by the setting-up of agencies, branches or subsidiaries, as is expressly provided for in the second sentence of the first paragraph of Article 52 . Indeed, that is the form of establishment in which the applicant engaged in this case by opening an investment management office in the Netherlands. A company may also exercise its right of establishment by taking part in the incorporation of a company in another Member State, and in that regard Article 221 of the Treaty ensures that it will receive the same treatment as nationals of that Member State as regards participation in the capital of the new company .

18 The provision of United Kingdom law at issue in the main proceedings imposes no restriction on transactions such as those described above. Nor does it stand in the way of a partial or total transfer of the activities of a company incorporated in the United Kingdom to a company newly incorporated in another Member State, if necessary after winding-up and, consequently, the settlement of the tax position of the United Kingdom company. It requires Treasury consent only where such a company seeks to transfer its central management and control out of the United Kingdom while maintaining its legal personality and its status as a United Kingdom company .

19 In that regard it should be borne in mind that, unlike natural persons, companies are creatures of the law and, in the present state of Community law, creatures of national law . They exist only by virtue of the varying national legislation which determines their incorporation and functioning .

20 As the Commission has emphasized, the legislation of the Member States varies widely in regard to both the factor providing a connection to the national territory required for the incorporation of a company and the question whether a company incorporated under the legislation of a Member State may subsequently modify that connecting factor . Certain States require that not merely the registered office but also the real head office, that is to say the central administration of the company, should be situated on their territory, and the removal of the central administration from that territory thus presupposes the winding-up of the company with all the consequences that winding-up entails in company law and tax law . The legislation of other States permits companies to transfer their central administration to a foreign country but certain of them, such as the United Kingdom, make that right subject to certain restrictions, and the legal consequences of a transfer, particularly in regard to taxation, vary from one Member State to another .

21 The Treaty has taken account of that variety in national legislation . In defining, in Article 58, the companies which enjoy the right of establishment, the Treaty places on the same footing, as connecting factors, the registered office, central administration and principal place of business of a company . Moreover, Article 220 of the Treaty provides for the conclusion, so far as is necessary, of agreements between the Member States with a view to securing inter alia the retention of legal personality in the event of transfer of the registered office of companies from one country to another . No convention in this area has yet come into force .

22 It should be added that none of the directives on the coordination of company law adopted under Article 54 (3) (g) of the Treaty deal with the differences at issue here .

23 It must therefore be held that the Treaty regards the differences in national legislation concerning the required connecting factor and the question whether - and if so how - the registered office or real head office of a company incorporated under national law may be transferred from one Member State to another as problems which are not resolved by the rules concerning the right of establishment but must be dealt with by future legislation or conventions .

24 Under those circumstances, Articles 52 and 58 of the Treaty cannot be interpreted as conferring on companies incorporated under the law of a Member State a right to transfer their central management and control and their central administration to another Member State while retaining their status as companies incorporated under the legislation of the first Member State .

25 The answer to the first part of the first question must therefore be that in the present state of Community law Articles 52 and 58 of the Treaty, properly construed, confer no right on a company incorporated under the legislation of a Member State and having its registered office there to transfer its central management and control to another Member State .

26 Having regard to that answer, there is no need to reply to the second part of the first question .

Second question

27 In its second question, the national court asks whether the provisions of Council Directive 73/148 of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services give a company a right to transfer its central management and control to another Member State .

28 It need merely be pointed out in that regard that the title and provisions of that directive refer solely to the movement and residence of natural persons and that the provisions of the directive cannot, by their nature, be applied by analogy to legal persons .

29 The answer to the second question must therefore be that Directive 73/148, properly construed, confers no right on a company to transfer its central management and control to another Member State .

Third and fourth questions

30 Having regard to the answers given to the first two questions referred by the national court, there is no need to reply to the third and fourth questions .

Operative part

On those grounds,

THE COURT,

in answer to the questions referred to it by the High Court of Justice, Queen' s Bench Division, by order of 6 February 1987, hereby rules :

(1) In the present state of Community law, Articles 52 and 58 of the Treaty, properly construed, confer no right on a company incorporated under the legislation of a Member State and having its registered office there to transfer its central management and control to another Member State .

(2) Council Directive 73/148 of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, properly construed, confers no right on a company to transfer its central management and control to another Member State .

Judgment of the Court of 9 March 1999.

Centros Ltd v Erhvervs- og Selskabsstyrelsen.

Case C-212/97.

Summary

It is contrary to Articles 52 and 58 of the Treaty for a Member State to refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office but in which it conducts no business where the branch is intended to enable the company in question to carry on its entire business in the State in which that branch is to be created, while avoiding the need to form a company there, thus evading application of the rules governing the formation of companies which, in that State, are more restrictive as regards the paying up of a minimum share capital. Given that the right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty, the fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment.

That interpretation does not, however, prevent the authorities of the Member State concerned from adopting any appropriate measure for preventing or penalising fraud, either in relation to the company itself, if need be in cooperation with the Member State in which it was formed, or in relation to its members, where it has been established that they are in fact attempting, by means of the formation of a company, to evade their obligations towards private or public creditors established in the territory of the Member State concerned.

Grounds

1 By order of 3 June 1997, received at the Court on 5 June 1997 the Højesteret referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Articles 52, 56 and 58 of the Treaty.

2 That question was raised in proceedings between Centros Ltd, a private limited company registered on 18 May 1992 in England and Wales, and Erhvervs- og Selskabsstyrelsen (the Trade and Companies Board, `the Board') which comes under the Danish Department of Trade, concerning that authority's refusal to register a branch of Centros in Denmark.

3 It is clear from the documents in the main proceedings that Centros has never traded since its formation. Since United Kingdom law imposes no requirement on limited liability companies as to the provision for and the paying-up of a minimum share capital, Centros's share capital, which amounts to GBP 100, has been neither paid up nor made available to the company. It is divided into two shares held by Mr and Mrs Bryde, Danish nationals residing in Denmark. Mrs Bryde is the director of Centros, whose registered office is situated in the United Kingdom, at the home of a friend of Mr Bryde.

4 Under Danish law, Centros, as a `private limited company', is regarded as a foreign limited liability company. The rules governing the registration of branches (`filialer') of such companies are laid down by the Anpartsselskabslov (Law on private limited companies).

5 In particular, Article 117 of the Law provides:

`1. Private limited companies and foreign companies having a similar legal form which are established in one Member State of the European Communities may do business in Denmark through a branch.'$

6 During the summer of 1992, Mrs Bryde requested the Board to register a branch of Centros in Denmark.

7 The Board refused that registration on the grounds, inter alia, that Centros, which does not trade in the United Kingdom, was in fact seeking to establish in Denmark, not a branch, but a principal establishment, by

circumventing the national rules concerning, in particular, the paying-up of minimum capital fixed at DKK 200 000 by Law No 886 of 21 December 1991.

8 Centros brought an action before the Østre Landsret against the refusal of the Board to effect that registration.

9 The Østre Landsret upheld the arguments of the Board in a judgment of 8 September 1995, whereupon Centros appealed to the Højesteret.

10 In those proceedings, Centros maintains that it satisfies the conditions imposed by the law on private limited companies relating to the registration of a branch of a foreign company. Since it was lawfully formed in the United Kingdom, it is entitled to set up a branch in Denmark pursuant to Article 52, read in conjunction with Article 58, of the Treaty.

11 According to Centros the fact that it has never traded since its formation in the United Kingdom has no bearing on its right to freedom of establishment. In its judgment in Case 79/85 Segers v Bedrijfsvereniging voor Bank- en Verzekeringswegen, Groothandel en Vrije Beroepen [1986] ECR 2375, the Court ruled that Articles 52 and 58 of the Treaty prohibited the competent authorities of a Member State from excluding the director of a company from a national sickness insurance scheme solely on the ground that the company had its registered office in another Member State, even though it did not conduct any business there.

12 The Board submits that its refusal to grant registration is not contrary to Articles 52 and 58 of the Treaty since the establishment of a branch in Denmark would seem to be a way of avoiding the national rules on the provision for and the paying-up of minimum share capital. Furthermore, its refusal to register is justified by the need to protect private or public creditors and other contracting parties and also by the need to endeavour to prevent fraudulent insolvencies.

13 In those circumstances, the Højesteret has decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

`Is it compatible with Article 52 of the EC Treaty, in conjunction with Articles 56 and 58 thereof, to refuse registration of a branch of a company which has its registered office in another Member State and has been lawfully founded with company capital of GBP 100 (approximately DKK 1 000) and exists in conformity with the legislation of that Member State, where the company does not itself carry on any business but it is desired to set up the branch in order to carry on the entire business in the country in which the branch is established, and where, instead of incorporating a company in the latter Member State, that procedure must be regarded as having been employed in order to avoid paying up company capital of not less than DKK 200 000 (at present DKR 125 000)?'

14 By its question, the national court is in substance asking whether it is contrary to Articles 52 and 58 of the Treaty for a Member State to refuse to register a branch of a company formed in accordance with the legislation of another Member State in which it has its registered office but where it does not carry on any business when the purpose of the branch is to enable the company concerned to carry on its entire business in the State in which that branch is to be set up, while avoiding the formation of a company in that State, thus evading application of the rules governing the formation of companies which are, in that State, more restrictive so far as minimum paid-up share capital is concerned.

15 As a preliminary point, it should be made clear that the Board does not in any way deny that a joint stock or private limited company with its registered office in another Member State may carry on business in Denmark through a branch. It therefore agrees, as a general rule, to register in Denmark a branch of a company formed in accordance with the law of another Member State. In particular, it has added that, if Centros had conducted any business in England and Wales, the Board would have agreed to register its branch in Denmark.

16 According to the Danish Government, Article 52 of the Treaty is not applicable in the case in the main proceedings, since the situation is purely internal to Denmark. Mr and Mrs Bryde, Danish nationals, have formed a company in the United Kingdom which does not carry on any actual business there with the sole purpose of carrying on business in Denmark through a branch and thus of avoiding application of Danish legislation on the formation of private limited companies. It considers that in such circumstances the formation by nationals of one

Member State of a company in another Member State does not amount to a relevant external element in the light of Community law and, in particular, freedom of establishment.

17 In this respect, it should be noted that a situation in which a company formed in accordance with the law of a Member State in which it has its registered office desires to set up a branch in another Member State falls within the scope of Community law. In that regard, it is immaterial that the company was formed in the first Member State only for the purpose of establishing itself in the second, where its main, or indeed entire, business is to be conducted (see, to this effect, Segers paragraph 16).

18 That Mrs and Mrs Bryde formed the company Centros in the United Kingdom for the purpose of avoiding Danish legislation requiring that a minimum amount of share capital be paid up has not been denied either in the written observations or at the hearing. That does not, however, mean that the formation by that British company of a branch in Denmark is not covered by freedom of establishment for the purposes of Article 52 and 58 of the Treaty. The question of the application of those articles of the Treaty is different from the question whether or not a Member State may adopt measures in order to prevent attempts by certain of its nationals to evade domestic legislation by having recourse to the possibilities offered by the Treaty.

19 As to the question whether, as Mr and Mrs Bryde claim, the refusal to register in Denmark a branch of their company formed in accordance with the law of another Member State in which its has its registered office constitutes an obstacle to freedom of establishment, it must be borne in mind that that freedom, conferred by Article 52 of the Treaty on Community nationals, includes the right for them to take up and pursue activities as self-employed persons and to set up and manage undertakings under the same conditions as are laid down by the law of the Member State of establishment for its own nationals. Furthermore, under Article 58 of the Treaty companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community are to be treated in the same way as natural persons who are nationals of Member States.

20 The immediate consequence of this is that those companies are entitled to carry on their business in another Member State through an agency, branch or subsidiary. The location of their registered office, central administration or principal place of business serves as the connecting factor with the legal system of a particular State in the same way as does nationality in the case of a natural person (see, to that effect, Segers, paragraph 13, Case 270/83 Commission v France [1986] ECR 273, paragraph 18, Case C-330/91 Commerzbank [1993] ECR I-4017, paragraph 13, and Case C-264/96 ICI [1998] I-4695, paragraph 20).

21 Where it is the practice of a Member State, in certain circumstances, to refuse to register a branch of a company having its registered office in another Member State, the result is that companies formed in accordance with the law of that other Member State are prevented from exercising the freedom of establishment conferred on them by Articles 52 and 58 of the Treaty.

22 Consequently, that practice constitutes an obstacle to the exercise of the freedoms guaranteed by those provisions.

23 According to the Danish authorities, however, Mr and Mrs Bryde cannot rely on those provisions, since the sole purpose of the company formation which they have in mind is to circumvent the application of the national law governing formation of private limited companies and therefore constitutes abuse of the freedom of establishment. In their submission, the Kingdom of Denmark is therefore entitled to take steps to prevent such abuse by refusing to register the branch.

24 It is true that according to the case-law of the Court a Member State is entitled to take measures designed to prevent certain of its nationals from attempting, under cover of the rights created by the Treaty, improperly to circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of Community law.

25 However, although, in such circumstances, the national courts may, case by case, take account - on the basis of objective evidence - of abuse or fraudulent conduct on the part of the persons concerned in order, where appropriate, to deny them the benefit of the provisions of Community law on which they seek to rely, they must nevertheless assess such conduct in the light of the objectives pursued by those provisions (Paletta II, paragraph 25).

26 In the present case, the provisions of national law, application of which the parties concerned have sought to avoid, are rules governing the formation of companies and not rules concerning the carrying on of certain trades, professions or businesses. The provisions of the Treaty on freedom of establishment are intended specifically to enable companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community to pursue activities in other Member States through an agency, branch or subsidiary.

27 That being so, the fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment. The right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty.

28 In this connection, the fact that company law is not completely harmonised in the Community is of little consequence. Moreover, it is always open to the Council, on the basis of the powers conferred upon it by Article 54(3)(g) of the EC Treaty, to achieve complete harmonisation.

29 In addition, it is clear from paragraph 16 of Segers that the fact that a company does not conduct any business in the Member State in which it has its registered office and pursues its activities only in the Member State where its branch is established is not sufficient to prove the existence of abuse or fraudulent conduct which would entitle the latter Member State to deny that company the benefit of the provisions of Community law relating to the right of establishment.

30 Accordingly, the refusal of a Member State to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office on the grounds that the branch is intended to enable the company to carry on all its economic activity in the host State, with the result that the secondary establishment escapes national rules on the provision for and the paying-up of a minimum capital, is incompatible with Articles 52 and 58 of the Treaty, in so far as it prevents any exercise of the right freely to set up a secondary establishment which Articles 52 and 58 are specifically intended to guarantee.

31 The final question to be considered is whether the national practice in question might not be justified for the reasons put forward by the Danish authorities.

32 Referring both to Article 56 of the Treaty and to the case-law of the Court on imperative requirements in the general interest, the Board argues that the requirement that private limited companies provide for and pay up a minimum share capital pursues a dual objective: first, to reinforce the financial soundness of those companies in order to protect public creditors against the risk of seeing the public debts owing to them become irrecoverable since, unlike private creditors, they cannot secure those debts by means of guarantees and, second, and more generally, to protect all creditors, whether public or private, by anticipating the risk of fraudulent bankruptcy due to the insolvency of companies whose initial capitalisation was inadequate.

33 The Board adds that there is no less restrictive means of attaining this dual objective. The other way of protecting creditors, namely by introducing rules making it possible for shareholders to incur personal liability, under certain conditions, would be more restrictive than the requirement to provide for and pay up a minimum share capital.

34 It should be observed, first, that the reasons put forward do not fall within the ambit of Article 56 of the Treaty. Next, it should be borne in mind that, according to the Court's case-law, national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it (see Case C-19/92 Kraus v Land Baden-Württemberg [1993] ECR I-1663, paragraph 32, and Case C-55/94 Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano [1995] ECR I-4165, paragraph 37).

35 Those conditions are not fulfilled in the case in the main proceedings. First, the practice in question is not such as to attain the objective of protecting creditors which it purports to pursue since, if the company concerned

had conducted business in the United Kingdom, its branch would have been registered in Denmark, even though Danish creditors might have been equally exposed to risk.

36 Since the company concerned in the main proceedings holds itself out as a company governed by the law of England and Wales and not as a company governed by Danish law, its creditors are on notice that it is covered by laws different from those which govern the formation of private limited companies in Denmark and they can refer to certain rules of Community law which protect them, such as the Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (OJ 1978 L 222, p. 11), and the Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State (OJ 1989 L 395, p. 36).

37 Second, contrary to the arguments of the Danish authorities, it is possible to adopt measures which are less restrictive, or which interfere less with fundamental freedoms, by, for example, making it possible in law for public creditors to obtain the necessary guarantees.

38 Lastly, the fact that a Member State may not refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office does not preclude that first State from adopting any appropriate measure for preventing or penalising fraud, either in relation to the company itself, if need be in cooperation with the Member State in which it was formed, or in relation to its members, where it has been established that they are in fact attempting, by means of the formation of the company, to evade their obligations towards private or public creditors established on the territory of a Member State concerned. In any event, combating fraud cannot justify a practice of refusing to register a branch of a company which has its registered office in another Member State.

39 The answer to the question referred must therefore be that it is contrary to Articles 52 and 58 of the Treaty for a Member State to refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office but in which it conducts no business where the branch is intended to enable the company in question to carry on its entire business in the State in which that branch is to be created, while avoiding the need to form a company there, thus evading application of the rules governing the formation of companies which, in that State, are more restrictive as regards the paying up of a minimum share capital. That interpretation does not, however, prevent the authorities of the Member State concerned from adopting any appropriate measure for preventing or penalising fraud, either in relation to the company itself, if need be in cooperation with the Member State in which it was formed, or in relation to its members, where it has been established that they are in fact attempting, by means of the formation of a company, to evade their

Operative part

On those grounds,

THE COURT,

in answer to the question referred to it by the Højesteret by order of 3 June 1997, hereby rules:

It is contrary to Articles 52 and 58 of the EC Treaty for a Member State to refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office but in which it conducts no business where the branch is intended to enable the company in question to carry on its entire business in the State in which that branch is to be created, while avoiding the need to form a company there, thus evading application of the rules governing the formation of companies which, in that State, are more restrictive as regards the paying up of a minimum share capital. That interpretation does not, however, prevent the authorities of the Member State concerned from adopting any appropriate measure for preventing or penalising fraud, either in relation to the company itself, if need be in cooperation with the Member State in which it was formed, or in relation to its members, where it has been established that they are in fact attempting, by means of the formation of a company, to evade their obligations towards private or public creditors established in the territory of the Member State concerned.

JUDGMENT OF THE COURT

In Case C-167/01,

Kamer van Koophandel en Fabrieken voor Amsterdam

and

Inspire Art Ltd,

on the interpretation of Articles 43 EC, 46 EC and 48 EC,

1. By order of 5 February 2001, received at the Court on 19 April 2001, the Kantongerecht te Amsterdam (Amsterdam Cantonal Court) referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Articles 43 EC, 46 EC and 48 EC.

2. Those questions were raised in proceedings between the Kamer van Koophandel en Fabrieken voor Amsterdam (Amsterdam Chamber of Commerce and Industry), Netherlands (the Chamber of Commerce) and Inspire Art Ltd, a company governed by the law of England and Wales (Inspire Art), concerning the obligation imposed on Inspire Art's branch in the Netherlands to record, with its registration in the Dutch commercial register, its description as a formeel buitenlandse vennootschap (formally foreign company) and to use that description in its business dealings, such obligations being imposed by the Wet op de Formeel Buitenlandse Vennootschappen (Law on Formally Foreign Companies) of 17 December 1997 (*Staatsblad* 1997 No 697, the WFBV).

I - The legal framework

The relevant provisions of Community law

3. The first paragraph of Article 43 EC provides:

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

4. Article 48 EC extends entitlement to freedom of establishment, subject to the same conditions as those laid down for individuals who are nationals of the Member States, to companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community.

5. Article 46 EC permits the Member States to restrict the freedom of establishment of foreign nationals by adopting provisions laid down by law, regulation or administrative action, in so far as such provisions are justified on grounds of public policy, public security or public health.

6. Article 44(2)(g) EC empowers the Council of the European Union, for the purpose of giving effect to freedom of establishment, to coordinate to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 48 of the EC Treaty with a view to making such safeguards equivalent throughout the Community.

7. Various directives have in that manner been adopted by the Council on that basis (company-law directives) and, in particular, the following directives referred to in the dispute in the main proceedings.

…

The relevant provisions of national law

22. Article 1 of the WFBV defines a formally foreign company as a capital company formed under laws other than those of the Netherlands and having legal personality, which carries on its activities entirely or almost entirely in the Netherlands and also does not have any real connection with the State within which the law under which the company was formed applies ....

23. Articles 2 to 5 of the WFBV impose on formally foreign companies various obligations concerning the company's registration in the commercial register, an indication of that status in all the documents produced by it, the minimum share capital and the drawing-up, production and publication of the annual documents. The WFBV also provides for penalties in case of non-compliance with those provisions.

24.

In particular, Article 2 of the WFBV requires a company falling within the definition of a formally foreign company to be registered as such in the commercial register of the host State. An authentic copy in Dutch, French, German or English, or a copy certified by a director, of the instrument constituting the company must also be filed in the commercial register of the host State, and a copy of the memorandum and articles of association if they are contained in a separate instrument. The date of the first registration of that company, the national register in which and the number under which it is registered must also appear in the commercial register and, in the case of companies with a single member, certain information concerning that sole shareholder.

25. Article 4(4) provides for directors to be jointly and severally liable with the company for legal acts carried out in the name of the company during their directorship until the requirement of registration in the commercial register has been fulfilled.

26. Pursuant to Article 3 of the WFBV, all documents and notices in which a formally foreign company appears or which it produces, except telegrams and advertisements, must state the company's full name, legal form, registered office and chief place of business, and the registration number, the date of first registration and the register in which it is required to be registered under the legislation applicable to it. That article also requires it to be indicated that the company is formally foreign and prohibits the making of statements in documents or publications which give the false impression that the undertaking belongs to a Netherlands legal person.

27. Pursuant to Article 4(1) of the WFBV, the subscribed capital of a formally foreign company must be at least equal to the minimum amount required of Netherlands limited companies by Article 2:178 of the Burgerlijke Wetboek (Netherlands Civil Code, the BW), which was EUR 18 000 on 1 September 2000 (*Staatsblad* 2000, N 322). The paid-up share capital must be at least equal to the minimum capital (Article 4(2) of the WFBV, referring back to Article 2:178 of the BW). In order to ensure that formally foreign companies fulfil those conditions, an auditor's certificate must be filed in the commercial register (Article 4(3) of the WFBV).

28. Until the conditions relating to capital and paid-up share capital have been satisfied, the directors are jointly and severally liable with the company for all legal acts carried out during their directorship which are binding on the company. The directors of a formally foreign company are likewise jointly and severally responsible for the company's acts if the capital subscribed and paid up falls below the minimum required, having originally satisfied the minimum capital requirement. The directors' joint and several liability lasts only so long as the company's status is that of a formally foreign company (Article 4(4) of the WFBV).

29. Nevertheless, Article 4(5) of the WFBV states that the minimum capital provisions do not apply to a company governed by the law of a Member State or of a Member State of the European Economic Area (the E.E.A.) to which the Second Directive is applicable.

30. Article 5(1) and (2) of the WFBV requires the directors of formally foreign companies to keep accounts and hold them for seven years. Directors must produce annual accounts and an annual report. Those documents must be published by being lodged in the commercial register and must satisfy the conditions laid down in Title 9 of Book 2 of the BW, which makes it possible to be sure that they are consistent with the annual documents produced by Netherlands companies.

II - The dispute in the main proceedings and the questions referred for a preliminary ruling

34. Inspire Art was formed on 28 July 2000 in the legal form of a private company limited by shares under the law of England and Wales and it has its registered office at Folkestone (United Kingdom). Its sole director, whose domicile is in The Hague (Netherlands), is authorised to act alone and independently in the name of the company. The company, which carries on activity under the business name Inspire Art Ltd in the sphere of dealing in *objets d'art*, began trading on 17 August 2000 and has a branch in Amsterdam.

35. Inspire Art is registered in the commercial register of the Chamber of Commerce without any indication of the fact that it is a formally foreign company within the meaning of Article 1 of the WFBV.

36. Taking the view that that indication was mandatory on the ground that Inspire Art traded exclusively in the Netherlands, the Chamber of Commerce applied to the Kantongerecht te Amsterdam on 30 October

2000 for an order that there should be added to that company's registration in the commercial register the statement that it is a formally foreign company, in accordance with Article 1 of the WFBV, which would entail other obligations laid down by law, set out in paragraphs 22 to 33 above.

37. Inspire Art denies that its registration is incomplete, primarily because the company does not meet the conditions set out in Article 1 of the WFBV. As a secondary point, if the Kantongerecht were to decide that it met those conditions, it maintained that the WFBV was contrary to Community law, and to Articles 43 EC and 48 EC in particular.

38. In its order of 5 February 2001 the Kantongerecht held that Inspire Art was a formally foreign company within the meaning of Article 1 of the WFBV.

39. As regards the compatibility of the WFBV with Community law, it decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

1. Are Articles 43 EC and 48 EC to be interpreted as precluding the Netherlands, pursuant to the Wet op de formeel buitenlandse vennootschappen of 17 December 1997, from attaching additional conditions, such as those laid down in Articles 2 to 5 of that law, to the establishment in the Netherlands of a branch of a company which has been set up in the United Kingdom with the sole aim of securing the advantages which that offers compared to incorporation under Netherlands law, given that Netherlands law imposes stricter rules than those applying in the United Kingdom with regard to the setting-up of companies and payment for shares, and given that the Netherlands law infers that aim from the fact that the company carries on its activities entirely or almost entirely in the Netherlands and, furthermore, does not have any real connection with the State in which the law under which it was formed applies?

2. If, on a proper construction of those articles, it is held that the provisions of the Wet op de formeel buitenlandse vennootschappen are incompatible with them, must Article 46 EC be interpreted as meaning that the said Articles 43 EC and 48 EC do not affect the applicability of the Netherlands rules laid down in that law, on the ground that the provisions in question are justified for the reasons stated by the Netherlands legislature?

III - Preliminary observations

40. The Chamber of Commerce, the Netherlands Government and the Commission of the European Communities are of the view that the questions were too broadly framed by the national court. Since the dispute in the main proceedings concerned only the registration of a company in the commercial register, the Court must confine its analysis exclusively to the provisions of national law relating to that point.

…

42. In this connection, settled case-law makes it clear that the procedure provided for by Article 234 EC is an instrument for cooperation between the Court of Justice and the national courts (see, inter alia, Case C-343/90 *Lourenço Dias* [1992] ECR I-4673, paragraph 14).

43. In the context of that cooperation, the national court before which the dispute has been brought, which alone has direct knowledge of the facts of the case in the main proceedings and must assume responsibility for the subsequent judicial decision, is in the best position to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (*Lourenço Dias*, cited above, paragraph 15, and Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 18).

44. Consequently, where the question submitted by the national court concerns the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (*Lourenço Dias*, paragraph 16; Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59; Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38, and *Canal Satélite Digital*, cited above, paragraph 18).

45. It is nevertheless equally settled case-law that the Court considers that it may, if need be, examine the circumstances in which the case was referred to it by the national court, in order to assess whether it has jurisdiction (Case 244/80 *Foglia* [1981] ECR 3045, paragraph 21, and *Canal Satélite Digital*, paragraph 19). The spirit of cooperation which must prevail in preliminary ruling proceedings requires the national court for its part to have regard to the function entrusted to the Court of Justice, which is to contribute to the administration of justice in the Member States and not to give opinions on general or hypothetical questions (see, *inter alia*, *Foglia*, cited above, paragraphs 18 and 20; *Lourenço Dias*, paragraph 17;

Bosman, cited above, paragraph 60, and Case C-451/99 *Cura Anlagen* [2002] ECR I-3193, paragraph 26).

46. Moreover, in order to enable the Court to give a useful interpretation of Community law, it is essential for the national court to explain why it considers that an answer to its questions is necessary for resolving the dispute (see, inter alia, *Foglia*, paragraph 17).

47. With that information in its possession, the Court will then be in a position to ascertain whether the interpretation of Community law which is sought is related to the actual nature and subject-matter of the main proceedings. If it should appear that the question raised is manifestly irrelevant for the purposes of deciding the case, the Court must declare that there is no need to proceed to judgment (*Lourenço Dias*, paragraph 20).

48. Having regard to the foregoing, the Court must consider whether the questions referred by the national court in this case are relevant to resolution of the dispute.

49. Although the issue at the heart of the dispute in the main proceedings is whether or not Inspire Art must be registered as a formally foreign company in the business register, the fact remains that that registration automatically and inextricably entails a number of legal consequences provided for by Articles 2 to 5 of the WFBV.

50. The national court has thus considered that the question of compatibility with Articles 43 EC, 46 EC and 48 EC arose more particularly in respect of certain of the obligations provided for by Articles 2 to 5 of the WFBV, namely, those relating to registration as a formally foreign company, the indication of that status in all documents produced by the company, the minimum capital required and the personal liability of the directors as joint and several debtors when the company's share capital has never reached or has fallen below the minimum amount of capital required by law.

51. In order to provide the national court with a helpful answer, within the meaning of the case-law referred to above, it is in consequence necessary to examine all those provisions, having regard to freedom of establishment as guaranteed by the EC Treaty, and also to the company-law directives.

Consideration of the questions referred

52. By those questions, which may appropriately be considered together, the national court seeks in substance to ascertain:

- whether Articles 43 EC and 48 EC must be interpreted as precluding legislation of a Member State, such as the WFBV, which attaches additional conditions, such as those laid down in Articles 2 to 5 of that law, to the establishment in that Member State of a company formed under the law of another Member State with the sole aim of securing certain advantages compared with companies formed under the law of the Member State of establishment which imposes stricter rules than those imposed by the law of the Member State of formation with regard to the setting-up of companies and paying-up of shares;
- whether the fact that the law of the Member State of establishment infers that aim from the circumstance of that company's carrying on its activities entirely or almost entirely in that latter Member State and of its having no genuine connection with the State in accordance with the law of which it was formed makes any difference to the Court's analysis of that question;
- and whether, if an affirmative answer is given to one or other of those questions, a national law such as the WFBV may be justified under Article 46 EC or by overriding reasons relating to the public interest.

53. In the first place, Article 5(1) and (2) of the WFBV, mentioned in the questions referred for a preliminary ruling, concerns the keeping and filing of the annual accounts of formally foreign companies. Article 5(3) of the WFBV provides, however, that the obligations laid down in those subparagraphs are not to apply to companies governed by the law of another Member State and to which the Fourth Directive, inter alia, applies. Inspire Art is covered by that exception, since it is governed by the law of England and Wales and since it falls within the scope *ratione personæ* of the Fourth Directive.

54. There is therefore no longer any need for the Court to consider whether a provision such as Article 5 of the WFBV is compatible with Community law.

55. Secondly, several of the provisions of the WFBV fall within the scope of the Eleventh Directive, since that concerns disclosure requirements in respect of branches opened in a Member State by companies covered by the First Directive and governed by the law of another Member State.

56. In that connection, first, as the Commission observes, some of the obligations imposed by the WFBV concern the implementation in domestic law of the disclosure requirements laid down by the Eleventh Directive.

57. Those are, more specifically, the provisions requiring: an entry in the business register of the host Member State showing registration in a foreign business register, and the number under which the company is registered in that register (Article 2(1) of the WFBV and Article 2(1)(c) of the Eleventh Directive), filing in the Netherlands business register of a certified copy of the document creating the company and of its memorandum and articles of association in Dutch, French, English or German (Article 2(1) of the WFBV and Articles 2(2)(b) and 4 of the Eleventh Directive), and the filing every year in that business register of a certificate of registration in the foreign business register (Article 5(4) of the WFBV and Article 2(2)(c) of the Eleventh Directive).

58. Those provisions, the compatibility of which with the Eleventh Directive has not been called into question, cannot be regarded as constituting any impediment to freedom of establishment.

59. Nevertheless, even if the various disclosure measures referred to at paragraph 57 above are compatible with Community law, that does not automatically mean that the sanctions attached by the WFBV to non-compliance with those disclosure measures must also be compatible with Community law.

60. Article 4(4) of the WFBV provides for directors to be jointly and severally liable with the company for legal acts adopted in the name of the company during their directorship for so long as the requirements concerning disclosure in the business register have not been met.

61. It is true that Article 12 of the Eleventh Directive requires the Member States to provide for appropriate penalties where branches of companies fail to make the required disclosures in the host Member State.

62. The Court has consistently held that where a Community regulation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article 10 EC requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law. For that purpose, while the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalised in conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive (Case 68/88 *Commission* v *Greece* [1989] ECR 2965, paragraphs 23 and 24; Case C-326/88 *Hansen* [1990] ECR I-2911, paragraph 17; Case C-36/94 *Siesse* [1995] ECR I-3573, paragraph 20, and Case C-177/95 *Ebony Maritime and Loten Navigation* [1997] ECR I-1111, paragraph 35).

63. It is for the national court, which alone has jurisdiction to interpret domestic law, to establish whether the penalty provided for by Article 4(4) of the WFBV satisfies those conditions and, in particular, whether it does not put formally foreign companies at a disadvantage in comparison with Netherlands companies where there is an infringement of the disclosure requirements referred to in paragraph 56 above.

64. If the national court reaches the conclusion that Article 4(4) of the WFBV treats formally foreign companies differently from national companies, it must be concluded that that provision is contrary to Community law.

65. On the other hand, the list set out in Article 2 of the Eleventh Directive does not include the other disclosure obligations provided for by the WFBV, namely, recording in the commercial register the fact that the company is formally foreign (Articles 1 and 2(1) of the WFBV), recording in the business register of the host Member State the date of first registration in the foreign business register and information relating to sole members (Article 2(1) of the WFBV), and the compulsory filing of an auditor's certificate to the effect that the company satisfies the conditions as to minimum capital,

subscribed capital and paid-up share capital (Article 4(3) of the WFBV). Similarly, mention of the company's status of a formally foreign company on all documents it produces (Article 3 of the WFBV) is not included in Article 6 of the Eleventh Directive.

66. It is therefore necessary to consider, with regard to those obligations, whether the harmonisation brought about by the Eleventh Directive, and more particularly Articles 2 and 6 thereof, is exhaustive.

67. The Eleventh Directive was adopted on the basis of Article 54(3)(g) of the EC Treaty (now, after amendment, Article 44(2)(g) EC) which provides that the Council and Commission are to carry out the duties devolving on them under that article by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 58 with a view to making such safeguards equivalent throughout the Community.

68. Furthermore, it follows from the fourth and fifth recitals in the preamble to the Directive that the differences in respect of branches between the laws of the Member States, especially as regards disclosure, may interfere with the exercise of the right of establishment and must therefore be eliminated.

69. It follows that, without affecting the information obligations imposed on branches under social or tax law, or in the field of statistics, harmonisation of the disclosure to be made by branches, as brought about by the Eleventh Directive, is exhaustive, for only in that case can it attain the objective it pursues.

70. It must likewise be pointed out that Article 2(1) of the Eleventh Directive is exhaustive in formulation. Moreover, Article 2(2) contains a list of optional measures imposing disclosure requirements on branches, a measure which can have no *raison d'être* unless the Member States are unable to provide for disclosure measures for branches other than those laid down in the text of that directive.

…

72. It must therefore be concluded on this point that it is contrary to Article 2 of the Eleventh Directive for national legislation such as the WFBV to impose on the branch of a company formed in accordance with the laws of another Member State disclosure obligations not provided for by that directive.

73. Thirdly, several of the provisions of the WFBV do not fall within the scope of the Eleventh Directive. Those are the rules relating to the minimum capital required, both at the time of registration and for so long as a formally foreign company exists, and those relating to the penalty attaching to non-compliance with the obligations laid down by the WFBV, namely, the joint and several liability of the directors with the company (Article 4(1) and (2) of the WFBV). Those provisions must therefore be considered in the light of Articles 43 EC and 48 EC.

The existence of an impediment to freedom of establishment

Observations submitted to the Court

74. The Chamber of Commerce and the Netherlands, German, Italian and Austrian Governments are of the view that application of provisions such as those of the WFBV is not contrary to Articles 43 EC and 48 EC.

75. In the first place, the rules laid down by the WFBV concern neither the formation of companies under the law of another Member State nor their registration (and consequently their recognition). The validity of those companies is in fact recognised and they are not refused registration, with the result that freedom of establishment is not compromised.

76. They submit that the considerations of the Court in Case C-212/97 *Centros* [1999] ECR I-1459 are therefore irrelevant to the present case, because the latter is concerned solely with the rule governing registration of foreign companies without affecting the Member States' freedom to lay down conditions for the carrying on of certain trades, professions or businesses.

77. The Netherlands Government maintains that for companies formed under the law of another Member State and intending to carry on their activities in the Netherlands, the system of incorporation applied in the Netherlands is extremely liberal. In accordance with that principle, as formulated in Article 2 of the Wet conflictenrecht corporaties (the Law concerning the rules on conflict of laws applicable to legal

persons) of 17 December 1997 (the rules-of-conflict Law), a company which, by virtue of its contract or instrument of incorporation, has, at the time of its formation, its registered office or, failing that, the centre of its external operations in the State under the law of which it was formed, shall be governed by the law of that State.

78. The Netherlands Government submits that the existence of companies validly formed under the law of another Member State is recognised without further formality in the Netherlands. Those companies are subject to the law of the State of formation; it is as a rule important that those companies should carry on some activity in that State.

79. It has however become apparent that that very accommodating system has in practice led to increased use of foreign companies for ends which the Netherlands legislature had not covered or even foreseen. More and more frequently companies that carry on their activity principally or even exclusively on the Netherlands market are formed abroad with the aim of evading the overriding requirements of Netherlands company law.

80. In order to tackle that development, Article 6 of the rules-of-conflict Law has established a limited exception to that liberal regime, by providing that this law is without prejudice to the provisions of the [WFBV].

81. Next, the Chamber of Commerce and the Netherlands, German, Italian and Austrian Governments observe that the provisions of the WFBV do not concern freedom of establishment but are confined to imposing on companies with share capital formed under a law other than that of the Netherlands a limited number of additional obligations relating to the exercise of their business activities and the running of the company, with a view to ensuring that others are clearly informed that companies such as Inspire Art are formally foreign companies and that they are in addition given the same guarantees - by means of the filing of certain documents and certificates - when concluding contracts with those companies as they have when concluding contracts with Netherlands companies.

82. In their opinion, those conditions are non-discriminatory since they correspond to the mandatory rules of Netherlands company law applicable to limited-liability companies formed in the Netherlands. Moreover, the purpose of those conditions, which must be satisfied by Netherlands companies as well as by formally foreign companies, is to safeguard non-economic interests - recognised at Community level - concerning the protection of consumers and creditors.

83. Maintaining that the WFBV is applicable under private international law, the Chamber of Commerce and the Netherlands, German and Austrian Governments refer to the judgment in Case 81/87 *Daily Mail and General Trust* [1988] ECR 5483 and the relevant case-law. In their submission, in that case the Court held that Articles 43 EC and 48 EC did not constitute a restriction on the powers of the Member States to determine the relevant factor connecting a company to their national legal order. They infer from that judgment that those articles do not preclude the adoption under private international law of rules applying to companies falling in part within the scope of Netherlands law. In that context, the WFBV does no more than attach significance to the place in which the company carries on its activities, in addition to the connecting factor of the place of incorporation and registration.

84. In addition, the German and Austrian Governments have asserted that as a matter of principle the purpose of Articles 43 EC and 48 EC, as regards freedom to set up branches, is to enable undertakings carrying on activities in one Member State to achieve growth in another Member State, which is not so in the case of brass-plate companies.

85. The German and Austrian Governments question whether, with regard to formally foreign companies, branches ought not actually to be regarded as principal establishments and whether there ought not to be applied to them the principles of freedom of primary establishment. Following the same reasoning, the Italian Government maintains that the fact that a company established in one Member State has never carried on any activity in that State means that it cannot be considered to be a branch when it carries on activity in another Member State. By placing the sole centre of its activities in a State other than that to which it formally belongs, such a company must be considered to be primarily established in that first State.

86.

Finally, the Netherlands, German and Italian Governments observe that in its case-law the Court has recognised that a Member State is entitled to take measures designed to prevent certain of its nationals from attempting, under cover of the rights created by the Treaty, improperly to circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of Community law (*Centros*, paragraph 24, and the case-law cited therein). Whether or not there is any improper use must be determined taking into account, in particular, the objectives pursued by the provisions of Community law in question (Case C-206/94 *Paletta* [1996] ECR I-2357, paragraph 25).

87.

Those Governments argue that, according to the judgments in Case 79/85 *Segers* [1986] ECR 2375, paragraph 16, and *Centros*, paragraph 29, the fact that a company has been formed in one Member State but carries on all its activities through its branch established in another Member State does not constitute a sufficient reason for denying the persons concerned the right to freedom of establishment by pleading abuse, deceit and/or the unacceptable evasion of national laws.

…

89.

In consequence, where, as in the main proceedings, a company goes beyond merely exercising its right to freedom of establishment and where it was formed in another Member State for the purpose of circumventing the body of rules applying to the formation and running of companies in the Member State in which it carries on all its activities, those Governments maintain that the result of allowing that company to rely on freedom of establishment would be an unacceptable evasion of national law. Adoption of measures such as those set out in the WFBV is therefore justified as Community law now stands.

90.

By contrast, in the view of Inspire Art, the United Kingdom Government and the Commission the provisions of the WFBV constitute interference with the freedom of establishment guaranteed by Articles 43 EC and 48 EC, in that they impose on formally foreign companies obligations which render the right of establishment markedly less attractive for those companies. That indeed is the stated purpose of those provisions.

91.

Inspire Art, the United Kingdom Government and the Commission submit that the rules on freedom of establishment are applicable to a situation such as that concerned in the main proceedings. Referring to *Segers* and to *Centros*, they argue that a company may also rely on freedom of establishment where it was formed in one Member State for the sole purpose of being able to establish itself in another Member State where it carries on the essential part, or even all, of its activities. It is immaterial that the company was formed in the first Member State solely in order to avoid the statutory provisions of the second Member State. According to that case-law, there is no abuse, merely the exercise of the freedom of establishment guaranteed by the Treaty.

92.

The United Kingdom Government and the Commission maintain that Article 1 of the WFBV takes account of the place where the company's activity is carried on in order to attach to it a number of provisions mandatory in the host Member State. Use of actual activity as a connecting factor, which does not correspond to any yardstick provided for in Article 48 EC, interferes with freedom of establishment inasmuch as it makes the exercise of that freedom less attractive to companies formed abroad which intend subsequently to carry on activity in the Netherlands, on the ground that other rules have been held to be applicable, in addition to those of the State of formation.

93.

Inspire Art argues for a similar interpretation of the WFBV. It states that although under the national legislation companies are as a rule governed by the law of the State in which they were formed, the Netherlands legislature sought to counter the formation, which it regarded as improper, of companies under foreign laws with the aim of carrying on activity exclusively or principally in the Netherlands by declaring that the provisions of Netherlands company law were applicable to those companies. The legislature justified that regime by invoking the protection of creditors. It follows that the WFBV cannot be seen as an application of the real head office theory according to which a company is governed by the law of the Member State in which it has its actual head office.

94.

Lastly, the United Kingdom Government notes that it is of fundamental importance to the operation of the common market that it should be possible to set up secondary establishments in other Member States. It submits that in the circumstances of the case *Centros* is fully applicable.

The Court's answer

95. The Court has held that it is immaterial, having regard to the application of the rules on freedom of establishment, that the company was formed in one Member State only for the purpose of establishing itself in a second Member State, where its main, or indeed entire, business is to be conducted (*Segers*, paragraph 16, and *Centros*, paragraph 17). The reasons for which a company chooses to be formed in a particular Member State are, save in the case of fraud, irrelevant with regard to application of the rules on freedom of establishment (*Centros*, paragraph 18).

96. The Court has also held that the fact that the company was formed in a particular Member State for the sole purpose of enjoying the benefit of more favourable legislation does not constitute abuse even if that company conducts its activities entirely or mainly in that second State (*Segers*, paragraph 16, and *Centros*, paragraph 18).

97. It follows that those companies are entitled to carry on their business in another Member State through a branch, and that the location of their registered office, central administration or principal place of business serves as the connecting factor with the legal system of a particular Member State in the same way as does nationality in the case of a natural person (Case 270/83 *Commission* v *France* [1986] ECR 273, paragraph 18; *Segers*, paragraph 13, and *Centros*, paragraph 20.

98. Thus, in the main proceedings, the fact that Inspire Art was formed in the United Kingdom for the purpose of circumventing Netherlands company law which lays down stricter rules with regard in particular to minimum capital and the paying-up of shares does not mean that that company's establishment of a branch in the Netherlands is not covered by freedom of establishment as provided for by Articles 43 EC and 48 EC. As the Court held in *Centros* (paragraph 18), the question of the application of those articles is different from the question whether or not a Member State may adopt measures in order to prevent attempts by certain of its nationals improperly to evade domestic legislation by having recourse to the possibilities offered by the Treaty.

99. The argument that freedom of establishment is not in any way infringed by the WFBV inasmuch as foreign companies are fully recognised in the Netherlands and are not refused registration in that Member State's business register, that law having the effect simply of laying down a number of additional obligations classified as administrative, cannot be accepted.

100. The effect of the WFBV is, in fact, that the Netherlands company-law rules on minimum capital and directors' liability are applied mandatorily to foreign companies such as Inspire Art when they carry on their activities exclusively, or almost exclusively, in the Netherlands.

101. Creation of a branch in the Netherlands by companies of that kind is therefore subject to certain rules provided for by that State in respect of the formation of a limited-liability company. The legislation at issue in the case in the main proceedings, which requires the branch of such a company formed in accordance with the legislation of a Member State to comply with the rules of the State of establishment on share capital and directors' liability, has the effect of impeding the exercise by those companies of the freedom of establishment conferred by the Treaty.

102. The last issue for consideration concerns the arguments based on the judgment in *Daily Mail and General Trust*, namely, that the Member States remain free to determine the law applicable to a company since the rules relating to freedom of establishment have not led to harmonisation of the provisions of the private international law of the Member States. In this respect it is argued that the Member States retain the right to take action against brass-plate companies, that classification being in the circumstances of the case inferred from the lack of any real connection with the State of formation.

103. It must be stressed that, unlike the case at issue in the main proceedings, *Daily Mail and General Trust* concerned relations between a company and the Member State under the laws of which it had been incorporated in a situation where the company wished to transfer its actual centre of administration to another Member State whilst retaining its legal personality in the State of incorporation. In the main proceedings the national court has asked the Court of Justice whether the legislation of the State where a company actually carries on its activities applies to that company when it was formed under the law of another Member State (Case C-208/00 *Überseering* [2002] ECR I-9919, paragraph 62).

104.

It follows from the foregoing that the provisions of the WFBV relating to minimum capital (both at the time of formation and during the life of the company) and to directors' liability constitute restrictions on freedom of establishment as guaranteed by Articles 43 EC and 48 EC.

105. It must therefore be concluded that Articles 43 EC and 48 EC preclude national legislation such as the WFBV which imposes on the exercise of freedom of secondary establishment in that State by a company formed in accordance with the law of another Member State certain conditions provided for in domestic law in respect of company formation relating to minimum capital and directors' liability. The reasons for which the company was formed in that other Member State, and the fact that it carries on its activities exclusively or almost exclusively in the Member State of establishment, do not deprive it of the right to invoke the freedom of establishment guaranteed by the Treaty, save where abuse is established on a case-by-case basis.

Whether there is any justification

106. As a preliminary point, there can be no justification for the disclosure provisions of the WFBV, which have been found to be contrary to the Eleventh Directive (see paragraphs 71 and 72 above). As a result, only the arguments concerning the provisions of the WFBV relating to minimum capital and directors' liability will be considered below.

Observations submitted to the Court

108. According to the Chamber of Commerce and the Netherlands, German and Austrian Governments, the provisions of the WFBV are justified both by Article 46 EC and by overriding reasons relating to the public interest.

109. They maintain that the purpose of the WFBV is to counter fraud, protect creditors and ensure that tax inspections are effective and that business dealings are fair. Those aims have been recognised in the Court's decisions to be legitimate sources of justification.

110. According to the Chamber of Commerce and the Netherlands, German and Austrian Governments, the rule in Article 4 of the WFBV concerning minimum capital, its paying-up and its maintenance serves to protect creditors and others. Thus, the importance of minimum capital is expressly recognised in Article 6 of the Second Directive. The purpose of the rules on minimum capital is above all to strengthen the financial capacity of companies and thus to provide greater protection of private and public creditors. In a general way they help to protect all creditors against the risk of fraudulent insolvency connected to the formation of companies which have insufficient capital from the outset.

111. The Netherlands Government submits that directors' liability constitutes an appropriate sanction for non-compliance with the provisions of the WFBV. In the absence of Community harmonisation measures, the Member States enjoy a wide margin of discretion in determining the penalties to be applied in the case of non-compliance with their national rules (Case C-265/95 *Commission* v *France* [1997] ECR I-6959, paragraph 33). The choice of that penalty is on the one hand motivated by the wish to apply the same rule as that laid down for directors of a Netherlands company. Nor is it unknown to Community law, as may be seen from Article 51 of Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) (OJ 2001 L 294, p. 1).

112. On the other hand, the Netherlands Government maintains that, since directors are responsible for the proper conduct of company matters, it is to be expected that they should incur liability if the company does not comply with the provisions of the WFBV.

114. The Chamber of Commerce adds that the provisions of the WFBV are not discriminatory. In its view, they lead instead to the application to foreign companies of the rules applicable to companies governed by Netherlands law.

115. The Netherlands Government submits that the provisions of the WFBV concerning minimum capital and directors' liability are appropriate for the purpose of attaining the sought-after objective. In this regard it emphasises the point that that assessment cannot be made without taking into account the fundamental and central objective of the WFBV, namely, to combat improper use of foreign companies and abuse of freedom of establishment.

116.

In addition, the Austrian Government observes that the rules on minimum capital are an appropriate and proportionate means, as is recognised by Community law. As regards joint-stock companies, the Second Directive itself established the importance of minimum capital. There is however no such rule for limited-liability companies. Nevertheless, all the Member States, except Ireland and the United Kingdom of Great Britain and Northern Ireland, have rules on the minimum capital to be guaranteed by those companies. Unlike members' personal liability, which would frequently be of no use in the event of compulsory liquidation, company capital offers greater security.

117. The Chamber of Commerce submits that those measures do not go beyond what is necessary if the objective pursued is to be attained. Non-compliance with the obligations imposed by the WFBV does not result in refusal to recognise the foreign company but only in the joint and several liability of its directors. In that regard the Chamber of Commerce maintains that the fact that a company does not satisfy, or no longer satisfies, the rules on minimum capital is clear evidence that there is a risk of abuse or fraud, where moreover that company has no real connection to its State of formation.

118. Inspire Art, the United Kingdom Government and the Commission put forward the opposite argument and are of the view that the provisions of the WFBV are not justified.

119. In the first place, there is no justification for the WFBV to be found in Article 46 EC.

120. As regards abuse of the law, it follows from *Centros* that the mere fact that a company does not carry on any activity in the State of formation cannot constitute such abuse. It is instead for the national authorities and courts to establish in every case whether the conditions on which such a restriction might be justified have been satisfied. Legislation as general as the WFBV does not meet that condition.

121. In their submission, *Centros* recognised that it was possible for a Member State to restrict freedom of establishment where it pleaded non-compliance with provisions concerning the carrying on of certain trades, professions or businesses. That is not so in the circumstances of this case. So far as Inspire Art is concerned, the issue is not regulation of the conduct of its activities in the Netherlands but whether or not the rules of Netherlands company law, such as those on minimum capital, must be observed on setting up a secondary establishment in the Netherlands. The Court held in that judgment that taking advantage of the more favourable rules of another Member State cannot, in itself, constitute an abuse of the right of establishment but is a right inherent in the exercise of freedom of establishment.

122. Inspire Art, the United Kingdom Government and the Commission also note that the Court held in *Centros* that the protection of creditors does not in theory fall within the ambit of the system of derogations under Article 46 EC.

123. Nor, in their submission, can the provisions of the WFBV concerning minimum capital and directors' liability be justified by the imperative public-interest requirement of protection of creditors, because those provisions are not such as to guarantee that protection.

124. In that context, Inspire Art and the Commission observe that the company holds itself out as a company governed by the law of England and Wales and that creditors cannot therefore be deceived on that subject.

125. Furthermore, creditors must take some measure of responsibility for their own actions. If the assurances given them by the law of England and Wales do not satisfy them, they can either insist on additional security or refuse to conclude contracts with a company governed by foreign law.

126. The United Kingdom Government and the Commission maintain that the WFBV would not have been applicable if Inspire Art had carried out even minor activity in another Member State. In that case the risk run by creditors would, however, have been as great as it would have been if the activities were carried out in the Netherlands exclusively, or indeed greater.

127. According to Inspire Art, the minimum capital requirements do not guarantee any protection for creditors. Thus, the minimum capital might, for example, be converted into a loan immediately once it had been contributed and the company registered, even if the company was governed by Netherlands law. It would not therefore satisfy the creditors. Consequently, the provisions of the WFBV concerning minimum capital are not such as to achieve the intended purpose of protecting creditors.

128. Inspire Art and the Commission maintain that the rules on the joint and several liability of directors are discriminatory. Article 4(4) of the WFBV makes them jointly and severally liable where, after the company has been registered in the business register, minimum capital falls below the limit set. By contrast, the directors of a limited liability company governed by Netherlands law are not subject to that strict liability. Moreover, as opposed to companies governed by Netherlands law, the circle of potentially liable persons is extended to those who actually conduct the company's activities.

129. Inspire Art, the United Kingdom Government and the Commission submit that the provisions of Article 4(1), (2) and (4) of the WFBV are disproportionate because Inspire Art holds itself out as a company governed by the law of England and Wales.

130. Furthermore, less radical measures could in their view be envisaged. For example, as the Court has acknowledged in *Centros*, it could be made possible in law for public creditors to obtain the necessary guarantees from those foreign establishments, in so far as they feel that they are insufficiently protected by the company law of the State of formation.

The Court's answer

131. It must first of all be stated that none of the arguments put forward by the Netherlands Government with a view to justifying the legislation at issue in the main proceedings falls within the ambit of Article 46 EC.

132. The justifications put forward by the Netherlands Government, namely, the aims of protecting creditors, combating improper recourse to freedom of establishment, and protecting both effective tax inspections and fairness in business dealings, fall therefore to be evaluated by reference to overriding reasons related to the public interest.

133. It must be borne in mind that, according to the Court's case-law, national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must, if they are to be justified, fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the public interest; they must be suitable for securing the attainment of the objective which they pursue, and they must not go beyond what is necessary in order to attain it (see, in particular, Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32; Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37, and *Centros*, paragraph 34).

134. In consequence, it is necessary to consider whether those conditions are fulfilled by provisions relating to minimum capital such as those at issue in the main proceedings.

135. First, with regard to protection of creditors, and there being no need for the Court to consider whether the rules on minimum share capital constitute in themselves an appropriate protection measure, it is clear that Inspire Art holds itself out as a company governed by the law of England and Wales and not as a Netherlands company. Its potential creditors are put on sufficient notice that it is covered by legislation other than that regulating the formation in the Netherlands of limited liability companies and, in particular, laying down rules in respect of minimum capital and directors' liability. They can also refer, as the Court pointed out in *Centros*, paragraph 36, to certain rules of Community law which protect them, such as the Fourth and Eleventh Directives.

136. Second, with regard to combating improper recourse to freedom of establishment, it must be borne in mind that a Member State is entitled to take measures designed to prevent certain of its nationals from attempting, under cover of the rights created by the Treaty, improperly to circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of Community law (*Centros*, paragraph 24, and the decisions cited therein).

137. However, while in this case Inspire Art was formed under the company law of a Member State, in the case in point the United Kingdom, for the purpose in particular of evading the application of Netherlands company law, which was considered to be more severe, the fact remains that the provisions of the Treaty on freedom of establishment are intended specifically to enable companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community to pursue activities in other Member States through an agency, branch or subsidiary (*Centros*, paragraph 26).

138. That being so, as the Court confirmed in paragraph 27 of *Centros*, the fact that a national of a Member State who wishes to set up a company can choose to do so in the Member State the company-law rules of which seem to him the least restrictive and then set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty.

139. In addition, it is clear from settled case-law (*Segers*, paragraph 16, and *Centros*, paragraph 29) that the fact that a company does not conduct any business in the Member State in which it has its registered office and pursues its activities only or principally in the Member State where its branch is established is not sufficient to prove the existence of abuse or fraudulent conduct which would entitle the latter Member State to deny that company the benefit of the provisions of Community law relating to the right of establishment.

140. Last, as regards possible justification of the WFBV on grounds of protection of fairness in business dealings and the efficiency of tax inspections, it is clear that neither the Chamber of Commerce nor the Netherlands Government has adduced any evidence to prove that the measure in question satisfies the criteria of efficacy, proportionality and non-discrimination mentioned in paragraph 132 above.

141. To the extent that the provisions concerning minium capital are incompatible with freedom of establishment, as guaranteed by the Treaty, the same must necessarily be true of the penalties attached to non-compliance with those obligations, that is to say, the personal joint and several liability of directors where the amount of capital does not reach the minimum provided for by the national legislation or where during the company's activities it falls below that amount.

142. The answer to be given to the second question referred by the national court must therefore be that the impediment to the freedom of establishment guaranteed by the Treaty constituted by provisions of national law, such as those at issue, relating to minimum capital and the personal joint and several liability of directors cannot be justified under Article 46 EC, or on grounds of protecting creditors, or combating improper recourse to freedom of establishment or safeguarding fairness in business dealings or the efficiency of tax inspections.

143. In light of all the foregoing considerations, the answers to be given to the questions referred for a preliminary ruling must be:

- It is contrary to Article 2 of the Eleventh Directive for national legislation such as the WFBV to impose on the branch of a company formed in accordance with the laws of another Member State disclosure obligations not provided for by that directive.
- It is contrary to Articles 43 EC and 48 EC for national legislation such as the WFBV to impose on the exercise of freedom of secondary establishment in that State by a company formed in accordance with the law of another Member State certain conditions provided for in domestic company law in respect of company formation relating to minimum capital and directors' liability. The reasons for which the company was formed in that other Member State, and the fact that it carries on its activities exclusively or almost exclusively in the Member State of establishment, do not deprive it of the right to invoke the freedom of establishment guaranteed by the EC Treaty, save where the existence of an abuse is established on a case-by-case basis.

1. It is contrary to Article 2 of the Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State for national legislation such as the Wet op de Formeel Buitenlandse Vennootschappen (Law on Formally Foreign Companies) of 17 December 1997 to impose on the branch of a company formed in accordance with the laws of another Member State disclosure obligations not provided for by that directive.

2. It is contrary to Articles 43 EC and 48 EC for national legislation such as the Wet op de Formeel Buitenlandse Vennootschappen to impose on the exercise of freedom of secondary establishment in that State by a company formed in accordance with the law of another Member State certain conditions provided for in domestic company law in respect of company formation relating to minimum capital and directors' liability. The reasons for which the company was formed in that other Member State, and the fact that it carries on its activities exclusively or almost exclusively in the Member State of establishment, do not deprive it of the right to invoke

the freedom of establishment guaranteed by the EC Treaty, save where the existence of an abuse is established on a case-by-case basis.